

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 26, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP1682-CR

Cir. Ct. No. 2014CF4865

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOE ESTRADA, III,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: STEPHANIE G. ROTHSTEIN, Judge. *Affirmed.*

Before Kessler, Brash and Dugan, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Joe Estrada, III, appeals from a judgment of conviction, entered upon his guilty plea, on one count of second-degree reckless

homicide as party to a crime. He also appeals from an order of the circuit court that denied his postconviction motion for sentence modification. Estrada contends his sentence is unduly harsh and severe compared to that of a co-defendant. We reject Estrada's argument and affirm the judgment and order.

BACKGROUND

¶2 According to the criminal complaint, on November 1, 2014, police responded to a fight complaint. Two witnesses, who were awoken by arguing or screams outside their homes, reported there was a group of people kicking an individual on the ground. When police arrived, they found Alfonso Estrada-Cortes laying face up. Resuscitation efforts failed; the medical examiner determined the cause of death was blunt force trauma to the head. The police investigation ascertained that shortly after bar closing time, Estrada-Cortes's vehicle struck Leonardo Cortes's car, but Estrada-Cortes failed to stop after the accident.¹ Cortes and others, including Estrada, followed Estrada-Cortes in their vehicles and began to assault him once he finally stopped and exited his vehicle.

¶3 Both witnesses stated there was an SUV-type vehicle at the scene, possibly a Chevrolet Suburban. One of the witnesses reported the vehicle was white. One of the 911 calls reporting the fight was placed at 2:34 a.m.; at 2:40 a.m., police observed a white Suburban nearby, with multiple individuals inside. One of the passengers was Estrada. Estrada later admitted kicking Estrada-Cortes at least three times while he was on the ground and going through Estrada-Cortes's wallet after the attack.

¹ Despite the similarity in some names, it does not appear that any of the individuals named in this case are related to the victim.

¶4 Estrada, Dione Williams, and Stephano Torres were charged as co-defendants, each with one count of first-degree reckless homicide as party to a crime. Pursuant to a plea agreement, Estrada's charge was reduced to second-degree reckless homicide as party to a crime, and both sides would be free to argue the sentence. The circuit court accepted the charge amendment and Estrada's guilty plea. Williams and Torres also entered pleas to second-degree reckless homicide as party to a crime. The circuit court subsequently sentenced Estrada to twelve years' initial confinement and ten years' extended supervision, Williams to the maximum fifteen years' initial confinement and ten years' extended supervision, and Torres to eight years' initial confinement and ten years' extended supervision.

¶5 Estrada moved for postconviction relief, arguing his sentence was unduly harsh and unconscionable compared to Torres's sentence. The circuit court, which had sentenced all three defendants, denied the motion with a written order, explaining the differing sentences and concluding that Estrada's sentence was not unduly harsh, unconscionable, or disparate compared to Torres's sentence. Estrada appeals.

DISCUSSION

¶6 Wisconsin recognizes the importance of "individualized sentencing." See *State v. Gallion*, 2004 WI 42, ¶48, 270 Wis. 2d 535, 678 N.W.2d 197. At sentencing, a court must consider the principal objectives of sentencing, including the protection of the community, the punishment and rehabilitation of the defendant, and deterrence to others. *State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. In seeking to fulfill the sentencing objectives, the court should consider primary factors including the gravity of the offense, the

character of the offender, and the protection of the public, and the court may consider several additional factors. *See State v. Odom*, 2006 WI App 145, ¶7, 294 Wis. 2d 844, 720 N.W.2d 695. The sentence of a similarly situated co-defendant is relevant but not controlling. *See State v. Giebel*, 198 Wis. 2d 207, 220-21, 541 N.W.2d 815 (Ct. App. 1995).

¶7 “The mere fact that the [two] sentences are different is not enough to support a conclusion that [Estrada’s] sentence is unduly disparate.” *See State v. Perez*, 170 Wis. 2d 130, 144, 487 N.W.2d 630 (Ct. App. 1992). Defendants do not receive the same punishment simply because they are convicted of the same offenses.² So long as the disparity is not arbitrary or based on irrelevant considerations, the disparity is not actionable. *See Ocanas v. State*, 70 Wis. 2d 179, 186-87, 189, 233 N.W.2d 457 (1975). Estrada “bears the burden of establishing that the disparity in sentences was arbitrary or based upon considerations not pertinent to proper sentencing.” *See Perez*, 170 Wis. 2d at 144.

¶8 A circuit court may not revise its sentence merely upon reflection but may consider whether the sentence imposed was unduly harsh or unconscionable. *See State v. Grindemann*, 2002 WI App 106, ¶21, 255 Wis. 2d 632, 648 N.W.2d 507. We review a circuit court’s conclusion that its sentence was not unduly harsh for an erroneous exercise of discretion. *See id.*, ¶30.

² Estrada contends that in *State v. Ralph*, 156 Wis. 2d 433, 439, 456 N.W.2d 657 (Ct. App. 1990), “the Court held that if two co-actors are similarly situated, they should not be given disparate sentences.” In fact, the supreme court noted that *sentencing guidelines* discourage disparate sentences for similarly situated offenders. *See id.* However, sentencing guidelines were repealed in Wisconsin in 2009. *See State v. Barfell*, 2010 WI App 61, ¶4, 324 Wis. 2d 374, 782 N.W.2d 437, *review denied*, 2011 WI 15, 331 Wis. 2d 46, 794 N.W.2d 900.

¶9 Estrada does not claim that the circuit court improperly exercised its sentencing discretion in the first instance. The circuit court appropriately determined that protecting the community and Estrada’s rehabilitation were its main sentencing objectives. It considered relevant sentencing factors, like the aggravated nature of the offense, Estrada’s criminal history, and his lack of candor with the presentence investigation report interviewer. It also gave Estrada credit for being the first to take responsibility for the crime and for his educational and employment efforts. Any challenge to the original exercise of sentencing discretion would, therefore, fail.

¶10 Rather, Estrada claims that his twenty-two-year sentence is harsh compared to Torres’s eighteen-year sentence.³ Estrada’s brief is thus dedicated primarily to explaining why he believes Torres was a worse offender. This is nothing more than an argument that the circuit court improperly weighed the sentencing factors, but “the weight that is attached to any particular factor in sentencing is within the wide discretion of the sentencing court.” *Perez*, 170 Wis. 2d at 143.

¶11 In denying the postconviction motion, the circuit court explained why Estrada’s sentence was greater than Torres’s. The circuit court noted that Estrada admitted kicking the victim when he was already on the ground and then, to add insult to injury, Estrada went through the victim’s wallet. The circuit court was specifically troubled by group offenses in Estrada’s criminal history; the circuit court described the group offenses as “victimization ... by a group of

³ The disparity in the sentences is only in the initial confinement portion; both Estrada and Torres, as well as Williams, received ten years’ extended supervision.

people against someone who is vulnerable.” This homicide was Estrada’s third group offense; the first was a group disorderly conduct, the second was Estrada’s participation with a group of males who repeatedly raped a twelve-year-old victim. The circuit court was further troubled by Estrada’s “physical abusive actions towards the mother of his children, the fact that he was in arrears for child support, and that he was using alcohol and marijuana almost on a daily basis.” Finally, the circuit court noted that Estrada’s longer sentence also took into account the fact that Estrada was six years older than Torres.

¶12 Estrada has not demonstrated that the circuit court based its sentence on any improper sentencing considerations. He has, therefore, failed to meet his burden for obtaining relief. *See id.* at 144. We discern no erroneous exercise of discretion in either the circuit court’s original sentence or its determination that Estrada’s sentence is not unduly harsh compared to Torres’s.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

